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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1397

SUPER DUPER, INCORPORATED, d/b/a Super Duper Publications,

Plaintiff - Appellant,

v.

MATTEL, INCORPORATED, a Delaware Corporation,

Defendant – Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry F. Floyd, District Judge. (6:05-cv-01700-HFF)

Argued: March 24, 2010 Decided: June 10, 2010

Before SHEDD and AGEE, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: Thomas Edward Vanderbloemen, GALLIVAN, WHITE & BOYD, PA, Greenville, South Carolina, for Appellant. Thomas Henderson Dupree, Jr., GIBSON, DUNN & CRUTCHER, LLP,

Washington, D.C., for Appellee. **ON BRIEF:** W. Howard Boyd, Jr., Jennifer E. Johnsen, Adam C. Bach, GALLIVAN, WHITE & BOYD, PA, Greenville, South Carolina; Steven R. LeBlanc, DORITY & MANNING, P.A., Greenville, South Carolina, for Appellant. Dace A. Caldwell, GIBSON, DUNN & CRUTCHER, LLP, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Mattel, Incorporated ("Mattel") opposed the registration of several of Super Duper, Incorporated's ("Super Duper") trademarks in the United States Patent and Trademark Office ("USPTO") based on their alleged infringement of Mattel's preexisting marks. After the parties' efforts to reach a settlement failed, Super Duper filed a declaratory judgment action in the United States District Court for the District of South Carolina, requesting the court rule that its trademarks did not violate Mattel's intellectual property rights. Mattel counterclaimed, alleging that Super Duper had engaged in trademark infringement, trademark dilution, unfair competition, and fraud upon the USPTO.

After a week-long trial, a jury found that Super Duper's use of seven trademarks infringed

upon and/or diluted four of Mattel's preexisting marks and awarded Mattel $400,000 in damages.[1] Post-trial, Super Duper renewed its motion for judgment as a matter of law and Mattel moved for a permanent injunction, order of cancellation, increased profits, and an award of attorneys' fees and costs. The district court denied Super Duper's motion but granted those of Mattel by increasing the damages award to $999,113 and providing Mattel with $2,643,844.15 in attorneys' fees. Super Duper filed a timely appeal and we have jurisdiction under 28 U.S.C. § 1291.

On appeal, Super Duper challenges (1) the district court's denial of its motion for judgment as a matter of law, (2) multiple instructions submitted to the jury, and (3) the district court's award of increased profits and attorneys' fees. Our review of the record reveals no error requiring reversal. Accordingly, we affirm the judgment of the district court.

I.

We review de novo Super Duper's initial argument that the district court erred in denying its motion for judgment as a matter of law on Mattel's

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[1] The jury concluded that Super Duper's use of its SEE IT! SAY IT!, SAY AND SING, FISH AND SAY, FISH & SAY, SORT AND SAY, SORT & SAY, and SAY AND SORT trademarks infringed Mattel's SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, and THE FARMER SAYS marks. The jury also concluded that Super Duper's use of its SEE IT! SAY IT!, SAY AND SING, FISH AND SAY, FISH & SAY, SORT AND SAY, SORT & SAY, and SAY AND SORT trademarks was likely to dilute Mattel's famous SEE 'N SAY and THE FARMER SAYS marks.

claims for trademark infringement and trademark dilution. See Dotson v. Pfizer, Inc., 558 F.3d 284, 292 (4th Cir. 2009). Judgment as a matter of law is appropriate only when "there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." Int'l Ground Transp., Inc. v. Mayor & City Council of Ocean City, 475 F.3d 214, 218 (4th Cir. 2007) (quotation omitted). In considering the evidence presented at trial, we do "not make credibility determinations or weigh the evidence," as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) (quotation omitted).

After reviewing the record in the light most favorable to Mattel and disregarding all evidence favorable to Super Duper "that the jury [was] not required to believe," id. at 150-51, we cannot say that the evidence "supports only one reasonable verdict." Dotson, 558 F.3d at 292 (quotation omitted). The evidence presented at trial was sufficient for the jury to conclude that the simultaneous use of Mattel's and Super Duper's marks would (1) create a likelihood of confusion in the mind of an "appreciable number of ordinarily prudent purchasers" regarding the "source of the goods in question," Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 127 (4th Cir. 1990) (quotations omitted), and (2) "'impair[ ] the distinctiveness of [Mattel' s] famous mark[s].'" Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 264 (4th Cir. 2007) (quoting 15 U.S.C. § 1125(c)(2)(B)).

In regard to trademark infringement, Super Duper argues, inter alia, that Mattel failed to offer any evidence of actual confusion over a significant period of concurrent use of the marks and that there are many distinctions between its business and products and those of Mattel. We find these arguments unpersuasive. While it is true that a lack of "evidence of actual confusion over a substantial period of time" may create "a strong inference" of no likelihood of confusion, CareFirst of Maryland, Inc. v. First Care, P.C., 434 F.3d 263, 269 (4th Cir. 2006), the absence of such proof does not preclude a party from proving a likelihood of confusion based on a compilation of other evidence. It is, after all, "well established that no actual confusion is required to prove a case of trademark infringement."[2] Louis Vuitton, 507 F.3d at 263.

Furthermore, under these facts, the inference to be drawn from Mattel's lack of evidence of actual confusion was a matter properly submitted to the jury. See Reeves, 530 U.S. at 150 (noting that gleaning "inferences from the facts" is a "jury function[ ]"). Super Duper places great emphasis on the fact that its marks were in use for five-to-nine years before the start of trial in 2008, and that

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[2] See also CareFirst, 434 F.3d at 269 ("[P]roof of actual confusion is not necessary to show a likelihood of confusion . . . ."); Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 463 (4th Cir. 1996) ("[E]vidence of actual confusion is unnecessary."); Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc., 43 F.3d 922, 933 (4th Cir. 1995) ("[T]his Court has emphasized that a trademark owner need not demonstrate actual confusion."); AMP Inc. v. Foy, 540 F.2d 1181, 1186 (4th Cir. 1976) ("[A]ctual confusion is not an essential element in establishing a likelihood to confuse . . . .").

Mattel produced no evidence of actual confusion during that time. Mattel, however, first challenged Super Duper's use of its trademarks in the USPTO in 2004. The jury could reasonably conclude that Mattel's administrative challenge affected the manner in which Super Duper used and publicized its marks during the relevant period.

We also reject Super Duper's assertion that the jury should have weighed additional likelihood-of-confusion factors differently, such as differences in the parties' products, marks, and facilities. Because the likelihood-of-confusion analysis "depends on varying human reactions to situations incapable of exact appraisement," we treat the likelihood of confusion as an "inherently factual issue that depends on the facts and circumstances in each case." Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc., 43 F.3d 922, 933 (4th Cir. 1995) (quotations omitted). As a "cross-section of consumers," the jury is particularly "well-suited to evaluating whether an 'ordinary consumer' would likely be confused." Anheuser-Busch, Inc. v. L&L Wings, Inc., 962 F.2d 316, 318 (4th Cir. 1992)." Our function on appeal is not to "weigh the evidence," but to determine if the "record as a whole" supports the jury's verdict. Reeves, 530 U.S. at 150-51. We conclude that Mattel met that standard.

Super Duper's arguments in relation to Mattel's trademark dilution claims fare no better, as they primarily focus on the lack of survey evidence and expert testimony as to the likelihood of dilution. Our precedent does not support the proposition that the successful prosecution of a trademark dilution claim mandates the production of survey evidence or

expert testimony. See Louis Vuitton, 507 F.3d at 266 ("To determine whether a junior mark is likely to dilute a famous mark through blurring, the TDRA directs the [trier of fact] to consider all factors relevant to the issue, including six factors that are enumerated in the statute. . . ."). Of course, such evidence may prove helpful to the jury, but it is not required. Cf. id. at 266 ("Not every factor will be relevant in every case, and not every blurring claim will require extensive discussion of the factors.").

As we have explained, the jury was well situated to make the factual determination that Mattel's marks were "famous," that sufficient similarity existed between Super Duper's and Mattel's marks, and that this association was likely to impair the distinctiveness of Mattel's "famous" marks. See id. at 264-65. The Trademark Dilution Revision Act ("TDRA") requires nothing more, see 15 U.S.C. § 1125(c), and we are prohibited from reweighing the evidence or drawing inferences from the facts. See Reeves, 530 U.S. at 150.

II.

We now turn to Super Duper's claims that multiple instructions submitted to the jury failed to correctly state the law and require reversal of the judgment. "[I] t is well settled that a trial court has broad discretion in framing its instructions to a jury." Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co., 510 F.3d 474, 484 (4th Cir. 2007). We accordingly review the district court's jury instructions only "for abuse of discretion," although we "review de novo claims that the jury instructions failed to correctly state the law." Id. Affirmance is required so long as the instructions given by the

district court, "taken as a whole," "adequately state the controlling law." Id. (quotation omitted). In other words, we will reverse based on "error in jury instructions only if the error is determined to have been prejudicial, based on a review of the record as a whole." Abraham v. County of Greenville, 237 F.3d 386, 393 (4th Cir. 2001) (quotation omitted).

Super Duper first contends that the district court's instructions eliminated Mattel's burden of proving a likelihood of confusion by a preponderance of the evidence. We disagree. While the district court erred in instructing the jury that "[a]ny doubt regarding the outcome of the likelihood of confusion analysis must be resolved in favor of Mattel,"[3] Joint Appendix ("J.A.") at 2001, the jury instructions as a whole adequately and correctly stated the controlling law.

For example, the district court informed the jury that "Mattel ha[d] the burden of proving" the elements of a trademark infringement claim "by a preponderance of the evidence" and the jury was instructed to find in Super Duper's favor if "Mattel failed to prove any of" the requisite elements of a trademark infringement claim. Id. at 1998. The special verdict form also specifically asked the jury to determine whether "Mattel ha[d] proven by a preponderance of the evidence that any of Super Duper's trademarks . . . infringe[d] Mattel's

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[3] As the Supreme Court explained in KP Permanent Make-Up, Inc. v. lasting Impression I, Inc., 543 U.S. 111 (2004), the defendant in a trademark-infringement suit "has no free-standing need to show confusion unlikely" and is merely required "to leave the factfinder unpersuaded that the plaintiff has carried its own burden on that point." 543 U.S. at 120-21.

trademarks." Id. at 2034. Super Duper is accordingly unable to establish that the district court's error was "prejudicial" in light of the "record as a whole."[4] Abraham, 237 F.3d at 393 (quotations omitted).

Next, Super Duper argues the district court erred in instructing the jury that a lack of "evidence of actual confusion" is a "factor [that] is neutral and does not favor either party." J.A. at 2013. We have already recognized that whether there was a significant period of concurrent use of Super Duper' s and Mattel's marks without any evidence of actual confusion was a factual matter best left to the jury's determination. See Reeves, 530 U.S. at 150 (recognizing that "the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). Accordingly, the district court did not abuse its discretion in instructing the jury that an absence of evidence of actual confusion, in and of itself, was a neutral factor.[5] See AMP Inc., 540 F.2d at 1186

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[4] In light of our opinion in AMP Inc. v. Foy, 540 F.2d 1181 (4th Cir. 1976), we also reject Super Duper's challenge to the district court's instruction that if the jury found Mattel's trademarks to be strong marks, "Super Duper's trademarks (as the latecomer) must be substantially different from Mattel's trademarks to avoid a finding of infringement." J.A. at 2012; see AMP Inc., 540 F.3d at 1187 (citing "a respectable body of authority" that holds that "the second comer has a duty to so name and dress his product as to avoid all likelihood of consumers confusing it with the product of the first comer") (emphasis added) (quotation omitted).

[5] The district court did not abuse it discretion in refusing to grant Super Duper's request for a sophisticated user instruction, as Sharon Webber, the co-owner of Super Duper, testified at trial that Super Duper sold its goods to the "[v]ery

("[A]ctual confusion is not an essential element in establishing a likelihood to confuse . . . .").

Super Duper also contends that several aspects of the district court's instructions suggested that the jury could impose liability based solely on the similarity of Super Duper's and Mattel's trademarks. But see Commc'ns Satellite Corp v. Comcet, Inc., 429 F.2d 1245, 1252 (4th Cir. 1970) ("Resemblance of the marks is not alone sufficient to establish the likelihood of confusion."). On appeal, however, "we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." United States v. Rahman, 83 F.3d 89, 92 (4th Cir. 1996). We conclude that, in this case, the instructions given to the jury fairly state the controlling law.

For example, the district court's instruction regarding the elements of a trademark infringement claim specified seven factors the jury should consider in reaching its verdict: (1) the strength of Mattel's trademarks, (2) the similarity of Mattel's and Super Duper's trademarks, (3) the similarity of the goods that the trademarks identify, (4) the similarity of the parties' business facilities, (5) the similarity of the

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general public." J.A. at 675. Nor did the district court abuse its discretion in instructing the jury that the "ultimate consumers of Super Duper's products" were "children." Id. at 2013; see Lyons Partnership, L.P. v. Morris Constumes, Inc., 243 F.3d 789, 802 (4th Cir. 2001) (holding that "the similarity of child-oriented works must be viewed from the perspective of the child audience for which the products were intended") (quotation omitted).

parties' advertising, (6) Super Duper's intent in selecting its trademarks, and (7) any actual confusion between Super Duper's and Mattel's products or trademarks. Only the second factor related to "the similarity of Mattel's trademarks and Super Duper's trademarks." [6] J.A. at 2000. Furthermore, the court clearly explained that "[t]he presence or absence of any particular factor . . . should not necessarily resolve whether there is a likelihood of confusion" because the jury "must consider all [of the] relevant evidence." Id.

Moreover, the district court's specific instruction on the factor relating to the similarity of the parties' trademarks clarified that "[t]rademarks are not to be evaluated in a side by side comparison test," such as "a meticulous comparison in court." Id. at 2008. Rather, "[i]t is the overall impression created by the trademark from the ordinary consumer's cursory observation in the marketplace that will or will not lead to a likelihood of confusion." Id. (emphasis added). It was thus made clear to the jury that all relevant market-related factors must be taken into account in determining whether marks are similar and whether a likelihood of confusion ultimately exists.

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[6] While the district court erred in giving an instruction that fleetingly referred to the "similarity" between Super Duper's and Mattel's trademarks, J.A. at 2000, Super Duper failed to lodge an objection on this basis in the district court. Our review is consequently only for plain error, see United States v. Jeffers, 570 F.3d 557, 564 n.4 (4th Cir. 2009), and Super Duper cannot establish that this overlooked comment caused it prejudice. See United States v. Stitt, 250 F.3d 878, 884 (4th Cir. 2001) (noting that "actual prejudice [is] required by the third prong of plain-error review").

That the district court instructed the jury that "similarities" in the parties' marks "weigh more heavily than differences," J.A. at 2008, does not alter our analysis. Although we have stated that, in assessing the similarity of marks, courts do not "confine their scrutiny merely to similarities," Petro Stopping Ctrs., L.P. v. James River Petroleum, Inc., 130 F.3d 88, 94 (4th Cir. 1997), the district court's instruction did not remove the marks' dissimilarities from the jury's consideration. Indeed, the jury's search for similarities between Super Duper's and Mattel's marks would necessarily reveal the marks' dissimilarities, as similarity and dissimilarity are but two sides of the same coin.

Super Duper's argument as to the district court's mark-pairings instruction similarly lacks merit. The instruction in question simply stated that "the mere presence of a house mark, e.g., the name Super Duper, does not avoid a finding of likelihood of confusion as between two marks." Id. at 2008. In short, this instruction correctly explained that placement of Super Duper's house mark on its product packaging did not ipso facto foreclose the possibility that a likelihood of confusion existed between Super Duper's trademarks and those of Mattel. See CareFirst, 434 F.3d at 271-72 (recognizing that the effect of a mark pairing depends on the strength of the allegedly infringed mark, as well as any "differences in the public presentations of the[ ] marks" that would "significantly reduce the likelihood of confusion").

III.

Finally, Super Duper contests the district court's award of increased profits and attorneys' fees to Mattel. Super Duper's argument in this regard is predicated on the section of the TDRA that specifies that a plaintiff prevailing under the likelihood of dilution standard may only recoup profits, damages, costs, and attorneys' fees if "the mark . . . that is likely to cause dilution by blurring . . . was first used in commerce by the person against whom [relief] is sought after October 6, 2006." 15 U.S.C. § 1125(c)(5)(A). Although Super Duper is correct that its trademarks were in use before October 6, 2006, Super Duper failed to raise anything remotely resembling this argument in its Rule 50(a) motion for judgment as a matter of law. See Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2617 n.5 (2008) ("A motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a) before the case was submitted to the jury."). We accordingly review this issue only for plain error. See Price v. City of Charlotte, 93 F.3d 1241, 1248-49 (4th Cir. 1996).

Under the facts of this case, we decline to exercise our discretion to correct the error.[7] See Olano, 507 U.S. 725, 732 (1993) (noting that "the decision to correct [a] forfeited error [is] within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the

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[7] See also Corti v. Storage Tech. Corp., 304 F.3d 336, 341 (4th Cir. 2002) ("Before we can exercise our discretion to correct an error not raised below in a civil case, at a minimum, the requirements of United States v. Olano, 507 U.S. 725 (1993), must be satisfied.").

error 'seriously affect[s] the fairness integrity or public reputation of judicial proceedings.'" (quoting United States v. Young, 470 U.S. 1, 15 (1985))). The award of profits and attorneys' fees and costs in this case was independently justified by the jury's conclusion that Super Duper's use of seven trademarks infringed four of Mattel's preexisting marks. See 15 U.S.C. §§ 1117(a) & 1125(a) .

We recognize that the jury awarded no damages based on its finding of trademark infringement. But the award of $999,113 in lost profits now at issue was made by the district court, rather than the jury. Section 1117(a) specifically provides that, in cases like the one currently before us in which a plaintiff establishes trademark infringement under § 1125(a), "[i]f the court. . . find[s] that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case." In this case, the district court found the jury's award of $400,000 in lost profits inadequate and increased the award to $999,113, the amount of lost profits Mattel's expert testified was attributable to Super Duper's seven infringing marks.

Super Duper has simply failed to establish that the district court's award of lost profits would have differed had it not considered the jury's finding of trademark dilution. Accordingly, we decline to exercise our discretion to correct the district court's error in regard to the award of profits under the

TDRA.[8] See Stitt, 250 F.3d at 884 (noting that "actual prejudice [is] required by the third prong of plain-error review") (quotation omitted); see also United States v. Robinson, 460 F.3d 550, 557 (4th Cir. 2006) ("[A]n appellant on plain error review bears the burden of persuasion with respect to prejudice.").

We further conclude that the district court did not err in determining that this was an "exceptional case" thus rendering the award of attorneys' fees appropriate under 15 U.S.C. § 1117(a). The district court adopted the reasoning set forth in Mattel's petition for attorneys' fees in concluding that this case was "exceptional." In tandem with the district

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[8] We reject Super Duper's contention that the district court erred in increasing Mattel's award of lost profits. The district court's ruling in this regard is consistent with the equitable factors laid down in Synergistic International, LLC v. Korman, 470 F.3d 162, 175 (4th Cir. 2006), and does not constitute an abuse of discretion. See Metric & Multistandard Components Corp. v. Metric's, Inc., 635 F.2d 710, 715 (8th Cir. 1980) ("[T]he district court is given broad discretion to award the monetary relief necessary to serve the interests of justice . . . ."). Nor are we persuaded that the court erred in failing to put a more restrictive time limitation on Mattel's award of lost profits. Indeed, Super Duper's reliance on our opinion in Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001) is misplaced. Although Lyons established that "the doctrine of laches may be applied to equitable claims brought under the Lanham Act," 243 F.3d at 799 (emphasis omitted), Mattel did not unreasonably delay in instituting its Lanham Act claims; therefore, the doctrine of estoppel by laches does not apply. See What-A-Burger of Va., Inc. v. Whataburger, Inc., 357 F.3d 441, 449 (4th Cir. 2004) ("Indeed, the key question, for purposes of estoppel by laches, is not simply whether there has been some delay, but whether that delay was unreasonable.") (emphasis in original).

court's own observation that the "jury considered . . . overwhelming evidence of [Super Duper's] wrongdoing and determined that it both infringed and intentionally diluted certain of [Mattel's] marks," J.A. at 2708, the reasons stated in Mattel's attorneys' fees petition are sufficient to uphold the district court's ruling that this was an "exceptional case." See Retail Servs., Inc. v. Freebies Publ'g, 364 F.3d 535, 550 (4th Cir. 2004) (recognizing that an "exceptional case" is "one in which the defendant's conduct was malicious, fraudulent, willful or deliberate in nature" (quotation omitted)).

Because Super Duper failed to preserve its objections to the specific billing items it contests on appeal and/or to cite to any portion of the record demonstrating that Mattel, in fact, recouped the associated attorneys' fees, we further hold that the district court did not abuse its discretion in granting Mattel's request for attorneys' fees in the amount of $2,643,844.15. See Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 320 (4th Cir. 2003) ("[W]e review a district court's decision awarding or denying attorney's fees and costs for abuse of discretion."). Super Duper has simply "provided us with no [valid] basis . . . to discern the degree to which it believes the district court abused its discretion," Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988), and "[w]e will not make arguments for [a party] that it did not make in its briefs." O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1257 n.1 (10th Cir. 2001) (citing Fed. R. App. P. 28(a)(9)(A)). Accordingly, we find Super Duper's "argument without evidence unpersuasive, and conclude that the district court acted within its discretion in approving" the attorneys' fees

"described in the evidence before it." Gray v. Lockheed Aeronautical Sys. Co., 125 F.3d 1387, 1389 (11th Cir. 1997); see also Norman v. Hous. Auth. of the City of Montgomery, 836 F.2d 1292, 1301 (11th Cir. 1988) ("As the district court must be reasonably precise in excluding hours thought to be unreasonable or unnecessary, so should be the objections and proof from fee opponents.").

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

SUPER DUPER, INC. d/b/a Super Duper Publications, a South Carolina Corporation,	§	**Filed** March 31, 2009
Plaintiff and Counterdefendant,	§	
vs.	§	CIVIL ACTION NO. 6:05-1700-HFF-WMC
MATTEL, INC., a Delaware Corporation,	§	
Defendant and Counterclaimant.	§	

ORDER

I. INTRODUCTION

Pending before the Court is Defendant's Motion for Entry of Judgment, for Permanent Injunction, for Order of Cancellation, and for Increased Profits Pursuant to 15 U.S.C. § 1117 or, in

the alternative, to Alter or Amend Judgment. Having carefully considered the motion, the response, the reply, the record, and the applicable law, it is the judgment of this Court that Defendant's Motion for Entry of Judgment will be granted as modified, Defendant's Motion for Permanent Injunction will be granted as modified, Defendant's Motion for Order of Cancellation will be granted, and Defendant's Motion for Increased Profits Pursuant to 15 U.S.C. § 1117 will be granted as provided herein.

II. DISCUSSION

A. Permanent Injunction

The parties appear to agree that the standard set out in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) is the appropriate one that the Court should employ to guide its decision as to whether a permanent injunction should issue in this matter. According to the *eBay* court, before a permanent injunction can properly issue, the movant must demonstrate

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id.

Defendant contends that each of the above-listed factors weighs in favor of the Court's granting

its motion for a permanent injunction barring Plaintiff from transporting, distributing, offering for sale, or selling any good bearing any of the marks that the jury in this matter found infringed and intentionally diluted Defendant's marks. The motion also asks the Court to require Plaintiff to deliver to Defendant for destruction all products, advertising and promotional material, packaging, or other material bearing any of the marks that the jury found infringed and intentionally diluted Defendant's marks.

Plaintiff argues that Defendant is not entitled to such a broad injunction and that the injunction that Defendant has proposed does not satisfy the test set out in *eBay*.

As to the first factor, in light of the jury's verdict, coupled with this Court's view of the evidence, the Court finds that Defendant has suffered irreparable injury as a result of Plaintiff's misconduct, namely that Plaintiff's SEE IT! SAY!, SAY AND SING, FISH AND SAY, FISH & SAY, SORT AND SAY, SORT & SAY, and SAY AND SORT trademarks infringed and intentionally diluted the distinctive nature of Defendant's SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, and THE FARMER SAYS trademarks. Regarding factor two, the Court further finds that monetary damages are an insufficient remedy to compensate Defendant for Plaintiff's continuing misbehavior.

Factor three also weighs in favor of the Court's entering a permanent injunction. As noted by Defendant,

> [a]s an adjudged infringer and diluter, [Plaintiff] cannot complain about any hardship. By contrast, there is a risk of substantial hardship to [Defendant] because [Plaintiff] sustained use of the Infringing Marks will only continue to irreparably harm the consumer goodwill that [Defendant] has established in its SEE 'N SAY trademarks and [Defendant's] reputation as a whole.

(Def.'s Rep. to Pl.'s Resp. to Def.'s Mot. for Entry of Judg. 5) (citation omitted). The fourth factor also favors the entry of a permanent injunction. The public interest is served when the Court's gives effect to a jury verdict. That is precisely what this permanent injunction does. Moreover, the public interest is also served when a company's unlawful conduct is ordered to be suspended. Again, that is precisely what this permanent injunction is tailored to do. In fact, the public interest would be disserved if a permanent injunction did not issue.

Consequently, Defendant's motion for a permanent injunction will be granted, with one exception. To the extent that Plaintiff renames and relabels its products that the jury found to be unlawful, then destruction of such products will be unnecessary. "In other words, [Plaintiff] can continue to sell and produce the [unlawfully named] product but it must be another name." (Trans. 1299:5-6.)

B. Order of Cancellation

Section 1119 of Title 15 of the United States Code provides that,

> [i]n any action involving a registered mark the court may determine the right to registration, order the cancel[l]ation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Director, who shall make appropriate entry upon the records of the Patent and Trademark Office, and shall be controlled thereby.

Id.

Defendant moves the Court to order the cancellation of the registration of Plaintiff's SEE IT! SAY IT1 and FISH & SAY marks and to foreclose the registration of SORT AND SAY. Plaintiff, however, argues that an order would be a waste of judicial resources and would place Plaintiff at a disadvantage during any further court proceedings.

At the request of Plaintiff, the jury has spoken on this issue and, inasmuch as it found that Plaintiff's SEE IT! SAY IT!, FISH & SAY and SORT AND SAY marks are unlawful, the duty of the Court is to give effect to the jury's decision. *Gracie v. Gracie*, 217 F.3d 1060, 1066 (9th Cir. 2000) ("In light of the jury verdict, which the district court allowed to stand, the district court should have ordered cancellation of [the offending mark].") Moreover, the Court notes that, it is not merely serving as a rubber stamp. Instead, it wholly agrees with the jury's opinion on this issue. Thus, the Court will enter judgment accordingly.

C. Adjustment of Award[1]

Defendant requests an increased award amount pursuant to 15 U.S.C. § 1117(a), which provides that

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. **In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding**

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[1] Judge Currie was recently faced with some of the same issues that this case presents. *See All American Title Loans v. Title Cash of South Carolina*, No. 3:05-1280-CMC, 2007 WL 1464580 (D.S.C. May 17, 2007). Given the thoroughness of her opinion, when appropriate, the Court has adopted much of the law cited in that case here.

> **three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.** Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

15 U.S.C. § 1117(a) (emphases added).

Through its present motion, Defendant seeks to increase the amount awarded under the profits measure from $400,000 to $999,113, based on Defendant's expert's profit calculation. Whether to award an enhancement rests in the trial court's discretion. *Burger King Corp. v. Mason*, 710 F.2d 1480, 1495 (11th Cir. 1983) (noting also that district court may award extraordinary relief, including treble damages "*if* the district court believes that such an award would be just") (emphasis in original). The Court may also adjust an award of profits if the Court deems the award either excessive or inadequate. *Id.* Either action "clearly envisions the exercise of the trial judge's discretion." *Id.*

In deciding whether to grant Defendant's request, the Court considers the underlying purposes of the these provisions. They include deterring Plaintiff from further misconduct. *See Sands, Taylor & Wood v. Quacker Oats Co.*, 34 F.3d 1340, 1348 (7th Cir. 1994) (stating that remedial provisions are intended to "provide a sufficient deterrent to ensure

that the guilty party will not return to its former ways and once again pollute the marketplace"); *Mobius Management Systems, Inc., v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1025 (S.D.N.Y. 1994) (noting that while punitive damages are not allowed under the Lanham Act, its treble "enhancement [provisions] may be used to deter further willful violations"). In addition, these provisions are used "to compensate a plaintiff for its actual injuries." *Getty Petroleum Corp. v. Barto Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988). The Court may, therefore, "enhance a monetary recovery of damages or profits" or "award plaintiff a full accounting of an infringer's profits." *Id. See also Alpo Petfoods,, Inc. v. Ralston Purina Co.*, 997 F.2d 949, 955 (D.C. Cir. 1993) ("An enhancement is appropriate to compensate a Lanham Act plaintiff only for such adverse effects as can neither be dismissed as speculative nor precisely calculated. . . . Lost profits and market distortion are . . .appropriate bases for the catch-all enhancement. . . .").

The jury awarded less than the amounts sought by Defendant. And, although the Court agrees with the jury's evaluation of the evidence as to infringement and intentional dilution, it cannot say that it agrees with the jury's conclusions as to these measures of profits. The amounts awarded by the jury are neither sufficient to adequately compensate Defendant nor to deter Plaintiff from future misconduct. [2]

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[2] In fact, although not considered in the Court's making of this decision, Defendants have asserted, and Plaintiff has not denied, that Plaintiff continues its same unlawful conduct to this day.

Section 1117(a) provides, in relevant part, that "[i]n assessing profits the [trademark owner] shall be required to prove [the infringer's] sales only; [the infringer] must prove all elements of cost or deduction claimed. 15 U.S.C. § 1117(a). Having reviewed the evidence for the first time at trial, and then reviewing it again in the peace and quiet of chambers, the Court is persuaded that, although Defendant proved Plaintiff's sales, Plaintiff failed to prove the elements of costs and deductions that it claimed to offset those sales. Instead, it appears to the Court that many of the deductions that Plaintiff seeks to subtract from the sales are unsupported by any business records. [3]

Defendant's profit calculation is $999,113. The competent evidence in the record supports this calculation. Requiring Plaintiff to pay this amount will both fairly compensates Defendant and, hopefully, deter Plaintiff from any further unlawful conduct. Therefore, the Court will enter judgment for this amount. [4]

In an abundance of caution, in making this determination, the Court has also considered the following six factors in making this decision:

> (1) whether the defendant had the intent to confuse or deceive; (2) whether the sales

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[3] The Court is unpersuaded by any argument that the amount of profits should be decreased because of progressive encroachment. As stated above, Defendant was required only to prove the infringer's sales. It is Plaintiff's duty in this instance to prove any deductions. Its failure to do so is fatal to this claim.

[4] This amount "constitute[s] compensation and not a penalty." 15 U.S.C. § 1117(a).

> have been diverted; (3) the adequacy of other remedies; (4) any unreasonable delay by the plaintiff in asserting its rights; (5) the public interest in making the misconduct unprofitable; and (6) whether it is a case of palming off.

Synergistic Int'l, LLC v. Korman, 470 F.3d at 175.

As to factor one, whether Plaintiff had the intent to confuse or deceive, there was evidence in the record to support the jury's decision that Plaintiff intentionally diluted Defendant's SEE 'N SAY trademarks with seven of Plaintiff's trademarks. Factor two, whether sales have been diverted, is inapplicable. Regarding factor three, the adequacy of other remedies, the Court has considered other remedies but finds that none other is adequate. There is no competent evidence in the record that the fourth factor, any unreasonable delay by Defendant in asserting its rights, applies. Concerning the fifth factor, the public interest in making the misconduct unprofitable, in addition to Super Duper's misconduct that is the subject of this suit, the record is replete with Plaintiff's apparent proclivity in generously borrowing, without permission or payment, the ideas of others. The public has cause to make such misbehavior unprofitable.[5] The sixth factor, whether this is a a case of palming off, has no application here. These considerations, although not exhaustive, convince the Court that the award of profits as provided herein is proper.

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[5] The Court notes, however, that it has considered only the misconduct of Plaintiff that is the subject of this suit in weighing this factor in favor of granting Defendant relief.

CONCLUSION

Therefore, for the reasons set forth herein, as well as those set forth by Defendant, it is the judgment of this Court that Defendant's Motion for Entry of Judgment will be **GRANTED AS MODIFIED**, Defendant's Motion for Permanent Injunction will be **GRANTED AS MODIFIED**, Defendant's Motion for Order of Cancellation will be **GRANTED**, and Defendant's Motion for Increased Profits Pursuant to 15 U.S.C. § 1117 will **BE GRANTED AS PROVIDED HEREIN**.

IT IS SO ORDERED.

Signed this 31st day of March, 2009 in Spartanburg, South Carolina.

s/ Henry F. Floyd
HENRY F. FLOYD
UNITED STATES DISTRICT JUDGE

FILED: July 7, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1397
(6:05-cv-01700-HFF)

SUPER DUPER, INCORPORATED, d/b/a Super Duper Publications

Plaintiff - Appellant

v.

MATTEL, INCORPORATED, a Delaware Corporation

Defendant - Appellee

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Shedd, Judge Agee and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

SUPER DUPER, INC.	§	
d/b/a Super Duper	§	**Filed**
Publications,	§	March 31, 2009
a South Carolina	§	
Corporation,	§	
	§	
Plaintiff and	§	
Counterdefendant,	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	6:05-1700-HFF-WMC
	§	
	§	
MATTEL, INC.,	§	
a Delaware Corporation,	§	
	§	
Defendant and	§	
Counterclaimant.	§	

AMENDED JUDGMENT AND PERMANENT INJUNCTION

The jury having rendered verdicts on liability and damages in favor of Defendant and Counterclaimant Mattel, Inc. and against Plaintiff

and Counterdefendant Super Duper, Inc., and the Court having granted Defendant's motion for permanent injunction, motion for cancellation, and motion to amend or alter the judgment to increase the profits awarded to Defendant, the Court makes the following findings and orders:

A. On June 15, 2005, Plaintiff filed the complaint for declaratory judgment in this action against Defendant. In its complaint, Plaintiff alleged that the trademarks SORT AND SAY, SEE IT! SAY IT!, FOLD & SAY, FOLD AND SAY, FISH & SAY, FISH AND SAY, SAY AND DO, SAY & DO, SAY & GLUE, FUN DECK & SAY, SORT & SAY, SPIN, SAY & DO, SAY AND SORT, SPIN, SAY AND DO, and SAY AND SING do not infringe Defendant's trademarks SEE N' SAY, MOTHER NATURE SAYS, THE FARMER SAYS, WINKY SAYS, THE BEE SAYS, THE CLOCK SAYS, MOTHER GOOSE SAYS, GRANNY SAYS, BARBIE SAYS, MY CLOCK SAYS, SEE N' SAY JUNIOR, and WHOOO SAYS.

B. On April 12, 2006, Defendant filed its answer and alleged counterclaims against Plaintiff for trademark infringement, false designation of origin, dilution, and unfair competition as to Defendant's trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, THE FARMER SAYS, GRANNY SAYS, BARBIE SAYS, and MOTHER GOOSE SAYS, cancellation of registration, and registration of trademarks by fraudulent means.

C. Plaintiff filed a reply to Defendant's counterclaims on May 4, 2006, and an amended

reply to Defendant's counterclaims on February 2, 2007.

D. On June 11, 2007, Defendant filed an amended answer and amended counterclaims, alleging infringement of SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, GRANNY SAYS, and THE FARMER SAYS.

E. On December 18, 2007, in a hearing before the Court, Defendant informed the Court and Plaintiff that it was not pursuing claims relating to GRANNY SAYS.

F. This case was tried before a jury from April 17, 2008 to April 25, 2008. On April 25, 2008, the jury found as follows:

1. Plaintiff's marks SEE IT! SAY IT!, SAY AND SING, FISH AND SAY, FISH & SAY, SORT AND SAY, SORT & SAY, and SAY AND SORT (the "Infringing Marks") infringe Defendant's trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, and THE FARMER SAYS;

2. Defendant's trademarks SEE 'N SAY and THE FARMER SAYS are famous.

3. Plaintiff's trademarks SEE IT! SAY IT!, SAY AND SING, FISH AND SAY, FISH & SAY, SORT AND SAY, SORT & SAY, and SAY AND SORT dilute Defendant's SEE 'N SAY and THE FARMER SAYS trademarks;

4. Plaintiff's dilution of Defendant's SEE 'N SAY and THE FARMER SAYS trademarks was intentional;

5. Plaintiff's trademarks SAY AND DO, SAY & DO, FOLD AND SAY, FOLD & SAY, SPIN SAY & DO, SPIN SAY AND DO, SAY & GLUE and FUN DECK & SAY do not infringe or dilute Defendant's SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, and THE FARMER SAYS trademarks;

6. Defendant is entitled to Plaintiff's profits for the use of SEE IT! SAY IT! in the amount of $63,333; SAY AND SING in the amount of $20,002; FISH AND SAY in the amount of $63,333; FISH & SAY in the amount of $63,333; SORT AND SAY in the amount of $63,333; SORT & SAY in the amount of $63,333; and SAY AND SORT in the amount of $63,333; and

7. Defendant did not prove by clear and convincing evidence that Plaintiff made fraudulent representations to the U.S. Patent & Trademark Office regarding its applications to register FOLD & SAY, FISH & SAY, SORT AND SAY, and SAY AND SORT.

G. The parties agreed that Defendant's trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, and THE FARMER SAYS (the "SEE 'N SAY Marks") are valid trademarks, owned by Defendant.

H. The Court took judicial notice of the fact that 'N means "and" or "&" in the context of this case.

I. With the exception of the award of profits, the Court agrees with and adopts the findings of the jury.

J. The Court further finds that (1) Defendant will suffer irreparable harm if an injunction is not entered; (2) Defendant has no adequate remedy at law for Plaintiff's continued infringement of Defendant's SEE 'N SAY Marks and dilution of Defendant's SEE 'N SAY and THE FARMER SAYS Marks; (3) the balance of hardships between Defendant and Plaintiff leans heavily in favor of Defendant in entering an injunction; (4) the public interest will be served by entry of the injunction; and (5) Defendant sells products bearing its SEE 'N SAY Marks in South Carolina and throughout the United States. Therefore, a nationwide injunction is proper.

K. Pursuant to 15 U.S.C. § 1117(a), the Court finds that Plaintiff's profits awarded to Defendant by the jury were inadequate and should be increased given the following facts and circumstances: (1) the profits proved by Defendant arising from Plaintiff's Infringing Marks were $999,113; (2) the testimony of Plaintiff's expert on costs and revenue was based on a complex and unpersuasive formula, without documentary support for twelve of the nineteen years of costs claimed by Plaintiff; (3) Plaintiff had the burden to prove all deductible costs and did not meet that

burden because it had no cost records for two-thirds of the period claimed and its financial expert's "geometric rate of change" formula does not satisfy that burden; (4) Defendant's financial expert was more credible than Plaintiff's financial expert inasmuch as many of Plaintiff's expert's deductions were speculative and unsupported by business records; (5) As such, in that Defendant's expert's opinion was based on solid data, his testimony is entitled to more weight; (6) the jury found intentional dilution of Defendant's SEE 'N SAY and THE FARMER SAYS trademarks; and (7) the jury's allocation profits among the Infringing Marks was erroneous.

L. In its counterclaims, Defendant pled for cancellation of certain trademark registrations owned by Plaintiff and denial of registration of SORT AND SAY and SAY AND SORT. The Court takes judicial notice of the fact that Plaintiff has allowed its application to register SAY AND SORT to go abandoned pending this litigation. Consistent with the jury's verdict, the Court finds that cancellation of Plaintiff's registrations of SEE IT! SAY IT! and FISH & SAY and denial of registration of SORT AND SAY is proper.

M. The Court enters judgment as follows:

1. Monetary Judgment. Judgment of $999,113 is entered in favor of Defendant and against Plaintiff, with interest at the rate of 1.88% provided by law.

2. Permanent Injunction. Plaintiff, its subsidiaries, officers, agents, directors, servants, employees, partners, assigns, successors, affiliated companies, and attorneys and all persons in active concert and participation with them who receive actual notice of this Judgment by personal service or otherwise, are hereby permanently restrained and enjoined from any of the following:

a. Manufacturing, transporting, promoting, importing, advertising, publicizing, distributing, offering for sale, or selling any goods bearing any of the trademarks SEE IT! SAY IT!, SAY AND SING, FISH AND SAY, FISH & SAY, SORT AND SAY, SORT & SAY, or SAY AND SORT or any mark, name, symbol, design, or logo that is a counterfeit, copy or colorable imitation of, incorporates or is confusingly similar to any of Defendant's trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, or THE FARMER SAYS.

b. Manufacturing, transporting, promoting, importing, advertising, publicizing, distributing, offering for sale, or selling any goods under any of Defendant's trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY or THE FARMER SAYS without Defendant's express written consent to do so, or under any mark, name, symbol, design or logo that is likely to cause confusion or to cause mistake or to deceive persons into the erroneous belief that Plaintiff's business or goods are sponsored or endorsed by Defendant, are

authorized by Defendant, or are connected in some way with any of Defendant's trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, and/or THE FARMER SAYS.

c. Passing off, or inducing or enabling others to sell or pass off, any products as genuine, licensed, or authorized products bearing any Defendant's SEE 'N SAY Marks, if they are not genuine, licensed, or authorized.

d. Engaging in any act that dilutes or is likely to dilute the distinctive quality of Defendant's SEE 'N SAY or THE FARMER SAYS trademarks and/or injures or is likely to injure Defendant's business reputation.

e. Representing or implying that Plaintiff or its products are in any way sponsored by, affiliated with, or endorsed or licensed by Defendant.

f. Knowingly assisting, inducing, aiding or abetting any other person or business entity in engaging in or performing any activities referred to in paragraphs 2(a) to 2(e) above.

3. Order of Destruction. Plaintiff shall deliver to Defendant for destruction all products, advertising and promotional material, packaging, or other material bearing any of the marks SEE IT! SAY IT!, FISH & SAY, FISH AND SAY, SAY AND SORT, SORT & SAY, SORT AND SAY, or SAY AND SING, any other unlawful use of Defendant's SEE 'N SAY Marks, or any other

trademarks, names, or logos that are confusingly similar to any of Defendant's SEE 'N SAY Marks or likely to dilute Defendant's SEE 'N SAY or THE FARMER SAYS trademarks. In the alternative, Plaintiff shall rename and relabel all products, advertising and promotional material, packaging, or other material bearing any of the marks SEE IT! SAY IT!, FISH & SAY, FISH AND SAY, SAY AND SORT, SORT & SAY, SORT AND SAY, or SAY AND SING, any other unlawful use of Defendant's SEE 'N SAY Marks, or any other trademarks, names, or logos that are confusingly similar to any of Defendant's SEE 'N SAY Marks or likely to dilute Defendant's SEE 'N SAY or THE FARMER SAYS trademarks.

4. Notice of Compliance. Within thirty days of service of this Judgment, Plaintiff shall file a report with the Court, under oath, setting forth in detail the manner and form in which Plaintiff has complied with the permanent injunction and the order of destruction stated herein.

5. Order to Commissioner for Trademarks. The Commissioner for Trademarks of the U.S. Patent and Trademark Office is hereby ordered to cancel U.S. Registration No. 2,504,141 of SEE IT! SAY IT! and U.S. Registration No. 2,666,686 of FISH & SAY and deny registration to U.S. Serial No. 78/252,179 for SORT AND SAY.

6. Plaintiff's Declaratory Judgment Claims. The Court hereby dismisses Plaintiff's claims for declaratory judgment as moot.

7. Costs. Defendant, as the prevailing party, is entitled to an award of costs in the amount of $58,529.21, less the amount disallowed in the Court's Order filed this date.

8. Attorneys' Fees. As the prevailing party and because the Court finds this to be an exceptional case under 15 U.S.C. § 1117, Defendant is entitled to an award of reasonable attorneys' fees in the amount of $2,643,844.15.

9. Binding Effect. This Judgment shall be binding upon and inure to the benefit of the parties hereto and all successors and assigns, parent companies, officers, directors, shareholders, agents, affiliates, and all entities which are "related companies" within the meaning of 15 U.S.C. § 1055.

10. Continuing Jurisdiction. Notwithstanding any other provision herein, this Court shall retain jurisdiction to enforce this Judgment.

IT IS SO ORDERED.

Signed this 31st day of March, 2009 in Spartanburg, South Carolina.

s/ Henry F. Floyd

HENRY F. FLOYD

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

SUPER DUPER, INC. d/b/a Super Duper Publications, a South Carolina Corporation,	§	
Plaintiff and Counterdefendant,	§	
vs.	§	CA. NO. 6:05-CV-1700-HFF-WMC
MATTEL, INC., a Delaware Corporation,	§	
Defendant and Counterclaimant.	§	

VERDICT FORM

A. CLAIMS OF TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

1. Do you find that Mattel has proven by a preponderance of the evidence that any of Super Duper's trademarks shown below infringe Mattel's [redacted] trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, or THE FARMER SAYS?

Super Duper Trademark	Infringement	
SAY AND DO	YES ___	NO ✓
SAY & DO	YES ___	NO ✓
FOLD AND SAY	YES ___	NO ✓
FOLD & SAY	YES ___	NO ✓
SPIN, SAY & DO	YES ___	NO ✓
SFIN, SAY AND DO	YES ___	NO ✓
SEE IT! SAY IT!	YES ✓	NO ___
SAY & GLUE	YES ___	NO ✓
FUN, DECK & SAY	YES ___	NO ✓
SAY AND SING	YES ✓	NO ___
FISH AND SAY	YES ✓	NO ___
FISH & SAY	YES ✓	NO ___
SORT AND SAY	YES ✓	NO ___
SORT & SAY	YES ✓	NO ___
SAY AND SORT	YES ✓	NO ___

2. Do you find that Mattel has proven by a preponderance of the evidence that Super Duper has unfairly competed with Mattel as a result of its use of the trademarks shown below?

Super Duper Trademark	Unfairly Competed	
SAY AND DO	YES ___	NO ✓
SAY & DO	YES ___	NO ✓
FOLD AND SAY	YES ___	NO ✓
FOLD & SAY	YES ___	NO ✓
SPIN, SAY & DO	YES ___	NO ✓
SPIN, SAY AND DO	YES ___	NO ✓
SEE IT! SAY IT!	YES ___	NO ✓
SAY & GLUE	YES ___	NO ✓
FUN, DECK & SAY	YES ___	NO ✓
SAY AND SING	YES ___	NO ✓
FISH AND SAY	YES ___	NO ✓
FISH & SAY	YES ___	NO ✓
SORT AND SAY	YES ___	NO ✓
SORT & SAY	YES ___	NO ✓
SAY AND SORT	YES ___	NO ✓

If you answered NO, proceed to Question 5.

If you answered YES, please proceed to Question 3.

3. Do you find that Super Duper's infringement and unfair competition was intentional?

YES ___ NO ✓

4. Please identify the amount of damages you would award to Mattel for each infringing trademark and/or for each trademark that Super Duper has used to unfairly compete with Mattel.

Trademark	Amount of Damages
SAY AND DO	0
SAY & DO	0
FOLD AND SAY	0
FOLD & SAY	0
SPIN, SAY & DO	0
SPIN, SAY AND DO	0
SEE IT! SAY IT!	0
SAY & GLUE	0
FUN, DECK & SAY	0
SAY AND SING	0
FISH AND SAY	0
FISH & SAY	0
SORT AND SAY	0
SORT & SAY	0
SAY AND SORT	0

B. CLAIMS OF TRADEMARK DILUTION

5. Do you find that any of Mattel's trademarks listed below are famous?

Trademark	Famous	
SEE 'N SAY	YES ✓	NO
SEE 'N SAY JUNIOR	YES	NO ✓
SEE 'N SAY BABY	YES	NO ✓
THE FARMER SAYS	YES ✓	NO

If you answered NO to all of the above, please proceed to Question 9.

If you answered YES to any of the above, please proceed to Question 6.

6. Do you find by a preponderance of the evidence that any of Super Duper's trademarks identified below are likely to dilute the distinctive nature of any of Mattel's trademarks SEE 'N SAY, SEE 'N SAY JUNIOR, SEE 'N SAY BABY, and THE FARMER SAYS?

Super Duper Trademark	Likely to Dilute	
SAY AND DO	YES ___	NO ✓
SAY & DO	YES ___	NO ✓
FOLD AND SAY	YES ___	NO ✓
FOLD & SAY	YES ___	NO ✓
SPIN, SAY & DO	YES ___	NO ✓
SPIN, SAY AND DO	YES ___	NO ✓
SEE IT! SAY IT!	YES ✓	NO ___
SAY & GLUE	YES ___	NO ✓
FUN, DECK & SAY	YES ___	NO ✓
SAY AND SING	YES ✓	NO ___
FISH AND SAY	YES ✓	NO ___
FISH & SAY	YES ✓	NO ___
SORT AND SAY	YES ✓	NO ___
SORT & SAY	YES ✓	NO ___
SAY AND SORT	YES ✓	NO ___

If you answered NO to all of the above, please proceed to Question 9.

If you answered YES to any of the above, please proceed to Question 7.

7. Do you find that Super Duper's dilution of Mattel's SEE 'N SAY trademarks was intentional?

YES ✓ NO ___

If you answered NO, please proceed to Question 9.

If you answered YES, please proceed to Question 8.

8. Please identify the amount of damages you would award to Mattel for each diluting trademark identified below:

Trademark	Amount of Damages
SAY AND DO	0
SAY & DO	0
FOLD AND SAY	0
FOLD & SAY	0
SPIN, SAY & DO	0
SPIN, SAY AND DO	0
SEE IT! SAY IT!	63,333.00
SAY & GLUE	0
FUN, DECK & SAY	0
SAY AND SING	20,002.00
FISH AND SAY	63,333.00
FISH & SAY	63,333.00
SORT AND SAY	63,333.00
SORT & SAY	63,333.00
SAY AND SORT	63,333.00

C. CLAIM OF FRAUD ON THE U.S. PATENT & TRADEMARK OFFICE

9. Did Mattel demonstrate by clear and convincing evidence that Super Duper made any fraudulent representations to the U.S. Patent & Trademark Office in its application to register the trademark FOLD & SAY?

YES ___ NO ✓

10. Did Mattel demonstrate by clear and convincing evidence that Super Duper made any fraudulent representations to the U.S. Patent & Trademark Office in its application to register the trademark FISH & SAY?

YES ___ NO ✓

11. Did Mattel demonstrate by clear and convincing evidence that Super Duper made any fraudulent representations to the U.S. Patent & Trademark Office in its application to register the trademark SORT AND SAY?

YES ___ NO ✓

12. Did Mattel demonstrate by clear and convincing evidence that Super Duper made any fraudulent representations to the U.S. Patent & Trademark Office in its application to register the trademark SAY AND SORT?

YES ___ NO ✓

JURY FOREPERSON:

Print Name: s/ Jury Foreperson
JURY FOREPERSON

Sign Name: s/ Jury Foreperson

Date: 4/25/08